72648-0

FILED
June 25, 2015
Court of Appeals
Division I
State of Washington

NO. 72648-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WEAVER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA B. DOYLE

BRIEF OF RESPONDENT

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A. ISSUES

1. Whether Weaver's appeal should be dismissed as moot because this Court cannot provide effective relief.

2. Whether the trial court properly imposed an exceptional sentence above the standard sentencing range based on a jury's finding that Weaver impregnated a child victim of rape.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Oliver Weaver with Rape of a Child in the Second Degree (Count 1), and Rape in the Second Degree (Count 2). CP 5-6. Additionally, the State alleged the aggravating circumstance that the offenses resulted in the pregnancy of a child victim of rape. CP 135. A jury convicted Weaver as charged in February 2005. CP 125-26. The trial court imposed the same exceptional sentence on each count – a minimum term of 250 months imprisonment to a maximum term of life imprisonment. CP 7-17. The court treated both counts as the same criminal conduct, and ran the terms concurrently. CP 11.

In Weaver's first appeal, this Court affirmed Weaver's convictions; but, the Washington Supreme Court reversed and remanded for resentencing because Weaver did not "affirmatively

acknowledge" his criminal history. State v. Weaver, 171 Wn.2d 256, 260, 251 P.3d 876 (2011) (per curiam). At Weaver's resentencing on July 7, 2011, the State presented evidence that Weaver's prior felony convictions did not wash out, and the trial court agreed. CP 25, 41. Nonetheless, the trial court ruled that Weaver's current convictions violated double jeopardy, and resentenced Weaver only on the second-degree rape conviction (Count 2). CP 41, 24-34. The court imposed the same exceptional sentence of 250 months to life imprisonment. CP 24-34.

In his second appeal, Weaver raised multiple claims, including that the trial court's double jeopardy determination should result in the dismissal of his second-degree rape of a child conviction (Count 1), and that the trial court lacked the authority to impose an exceptional sentence. CP 36. The State cross-appealed, arguing that Weaver's two convictions did not put him in double jeopardy. Id. This Court held that Weaver's convictions did not violate double jeopardy, and declined to address Weaver's exceptional sentence claim because "Weaver could have challenged his exceptional sentence in his first appeal but did not." CP 37.

On remand, the parties agreed that trial court should impose a sentence only on Count 1, because this Court's ruling impacted only that count, and the trial court had previously imposed a sentence on Count 2. CP 58, 139-40; RP 31, 33-34.[1] The trial court[2] imposed the same exceptional and indeterminate sentence of 250 months to life imprisonment on Count 1, and noted that "[a]ll the same conditions apply." RP 37.

2. SUBSTANTIVE FACTS

This Court succinctly stated the facts of this case in its opinion following the first appeal:

> Oliver Weaver, a man in his 40s with a wife and child, operated a used car lot. In October 2002, he called 13 year old R.T. and her cousin over as they walked past the lot, and asked them if they wanted a job washing cars and cleaning his house. R.T., who had never met Weaver before, accepted his offer and began working for him a few afternoons a week. Coincidentally, R.T.'s mother and Weaver discovered they knew each other from about 25 years before.
>
> One afternoon in early December 2002, R.T. was cleaning Weaver's house. Weaver approached R.T. from behind and told her if she did not do as he wished, he would kill her. He then violently raped her for somewhere between 15 and 45 minutes. Weaver had a weapon, which R.T. thought was a bb gun.

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[1] The Verbatim Report of Proceedings consists of two consecutively paginated volumes designated as RP.

[2] By the time of the 2014 resentencing, the original trial judge, the Honorable Sharon Armstrong, had retired, and been replaced by the Honorable Theresa Doyle. RP 4.

> R.T. was frightened by Weaver's threats, and did not report the rape. She worked at Weaver's home a few times over the next several weeks because her mother needed money, but in January, she told her mother she did not want to work there anymore. In February 2003, afraid she was pregnant, R.T. told a school friend what Weaver had done. The friend informed a school security guard, who called police.
>
> R.T.'s doctor confirmed she was pregnant. On the advice of her mother and doctor, she had an abortion. A fetal tissue sample was collected, and the State's DNA expert calculated a one in 240 million probability that Weaver was not the father. According to the expert, a probability of merely one in 1,000 that a donor is not the father is a "very strong indication" of paternity.

State v. Weaver, 140 Wn. App. 349, 351-52, 166 P.3d 761 (2007), reversed, 171 Wn.2d 256, 251 P.3d 876 (2011) (per curiam).

At his resentencing in October 2014, Weaver asked the trial court to impose 95 months on Count 1, the low end of the standard sentencing range. RP 33; CP 139-40. He based his request on his "rapidly deteriorating" health, and diagnosis of stage three pancreatic cancer. RP 35; CP 140. Weaver indicated that he had "15, 16 months" to live. RP 35. The trial court acknowledged Weaver's poor health, stating, "I'm sorry about your medical situation," and then explained:

> I have reviewed the entire record, and I will impose the same sentence as Judge Armstrong did. Making an independent determination that that's appropriate.

> It's an exceptional sentence of 250 months on Count 1. And that the basis of that is the findings by the jury that the victim was a child . . . but more to the point that as a result of the offense she did – she became pregnant.

RP 37.

The prosecutor suggested that the trial court "re-sign" the original judgment and sentence "with today's date" to avoid any issue about "what law applies at the time." RP 38. The trial court adopted that suggestion in part, and "re-signed" the previously entered Findings of Fact and Conclusions of Law for Exceptional Sentence, while executing a new judgment and sentence. CP 125-38. In the Conclusions of Law, the trial court found substantial and compelling reasons to impose an exceptional sentence based on the jury's finding that Weaver's offense "resulted in the pregnancy of a child victim of rape." CP 133 (quoting RCW 9.94A.535(2)(k)). At the bottom of the page, the trial court added the following sentence: "*10/3/14 The exceptional sentence of 250 months is re-imposed on Count I for the above reasons." CP 133.

C. ARGUMENT

1. WEAVER'S APPEAL SHOULD BE DISMISSED AS MOOT.

Weaver argues that the trial court unreasonably imposed an exceptional sentence on Count 1 without taking into account his terminal illness, and its direct effect on the statutory purposes for which an exceptional sentence is authorized. Weaver's claim fails because regardless of the propriety of the exceptional sentence imposed on Count 1, Weaver remains bound by the *same* exceptional sentence previously imposed on Count 2. This Court should dismiss Weaver's appeal as moot because it cannot provide effective relief.

In general, "[a] case is moot if a court can no longer provide effective relief." Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). An appellate court will not review a case that has become moot to avoid the danger that an erroneous decision will result from the parties' failure to zealously advocate their position since they no longer have an interest in the outcome of the litigation. Id. The only exception to this rule involves cases that raise "matters of continuing and substantial public interest." Id.; see also Tacoma News, Inc. v. Cayce, 172 Wn.2d 58, 64, 256 P.3d

1179 (2011). The issue of mootness can be raised at any time because it relates to the court's jurisdiction. Harbor Lands LP v. City of Blaine, 146 Wn. App. 589, 592, 191 P.3d 1282 (2008).

Here, Weaver is subject to concurrent, exceptional sentences of 250 months to life imprisonment on each count. CP 129. On appeal, his challenge is limited to the trial court's imposition of an exceptional sentence on Count 1. See Appellant's Opening Br. at 3 (recognizing that, "Because the resentencing that was ordered was premised on a double jeopardy challenge to count I, the defense did not contest the exceptional sentence imposed on count II."). Thus, even if this Court agreed with Weaver, and held that the exceptional sentence imposed on Count 1 was clearly excessive, it would have no practical effect because Weaver is still obligated to serve the same 250-months-to-life-imprisonment exceptional sentence imposed on Count 2. This Court cannot provide effective relief.

Further, the issue presented – whether the trial court abused its discretion by imposing an exceptional sentence in light of Weaver's terminal illness – is particular to the facts and proceedings in Weaver's case. The issue arose from the unique procedural history of Weaver's case, specifically this Court's

reversal of the trial court's double jeopardy determination on cross-appeal, and from Weaver's stage three pancreatic cancer diagnosis. RP 35. The issue is not likely to recur, nor is it of continuing and substantial public interest. Given that Weaver's unchallenged exceptional sentence on Count 2 obligates him to serve the same sentence he is challenging on Count 1, this Court should dismiss his appeal as moot.

2. THE TRIAL COURT PROPERLY IMPOSED AN EXCEPTIONAL SENTENCE ON COUNT 1.

Alternatively, if Weaver's appeal is not moot, then his claim should be dismissed as meritless. Weaver contends that the trial court abused its discretion by imposing a clearly excessive sentence, despite his "extraordinary and dire medical condition." Appellant's Opening Br. at 6. Weaver claims that the trial court did not mention that it found substantial and compelling reasons to depart from the standard sentencing range, and that it did not address his changed health circumstances.

Weaver is wrong on both counts. The trial court's Conclusions of Law specifically found "substantial and compelling reasons to impose an exceptional sentence," and the trial court acknowledged Weaver's "medical condition," after reviewing the

"entire record" and making an "independent determination," that an exceptional sentence was appropriate. CP 133; RP 37.

On review, an appellate court will not reverse an exceptional sentence unless (1) the sentence is clearly excessive or clearly too lenient under an abuse of discretion standard, (2) the reasons provided by the sentencing court do not justify a departure from the standard range under a de novo standard, or (3) there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence under a clearly erroneous standard. State v. France, 176 Wn. App. 463, 469, 308 P.3d 812 (2013), review denied, 179 Wn.2d 1015 (2014) (citing RCW 9.94A.585; State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005)).

In order to abuse its discretion in determining the length of an exceptional sentence above the standard range, a trial court must either rely on an untenable reason, or impose a sentence that "is so long that, in light of the record, it shocks the conscience of the reviewing court," such that no reasonable person would have imposed such a sentence. State v. Ritchie, 126 Wn.2d 388, 395-96, 894 P.2d 1308 (1995) (quoting State v. Ross, 71 Wn. App. 556, 571, 861 P.2d 473 (1993)); State v. Oxborrow, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986). Once a reviewing court has

determined that the facts support an exceptional sentence above the standard range, and that those reasons are substantial and compelling, "there is often nothing more to say." Ritchie, 126 Wn.2d at 396 (quoting Ross, 71 Wn. App. at 572). A trial court need not articulate any reasons for the length of an exceptional sentence. Id. at 392.

Here, the trial court indicated that it had reviewed the "entire record" before imposing an exceptional sentence, specifically noting that it had read:

> [A]ll the briefing . . . the first judgment and sentence, the findings of fact and conclusions of law. The Court of Appeals first opinion and remand. Then the second J&S . . . the second written findings and conclusions . . . the second opinion and the remand, and of course the jury findings that as a result of the crime first that the victim was a child . . . And that as a result of commission of the crimes she became pregnant.

RP 32. Additionally, the court heard argument from Weaver's counsel in support of a low-end standard range sentence, and Weaver's own words about his changed health circumstances. RP 33-37; see also CP 140 (defense sentencing memorandum referencing Weaver's "rapidly deteriorating" health and "myriad of medical issues that are being exacerbated by the lack of adequate medical care at DOC"). Immediately after Weaver's elocution, the

trial court stated, "I'm sorry about your medical situation," echoing its earlier sentiment that it was "sorry to hear" about Weaver's pancreatic cancer diagnosis. RP 35, 37. Given this record, there is no question that the trial court was well aware of Weaver's declining health and terminal diagnosis.

Nonetheless, the trial court made "an independent determination," and rejected Weaver's plea for a low-end, standard range sentence. RP 37. The trial court imposed the same exceptional sentence previously imposed by Judge Armstrong based on the jury's finding that Weaver raped and impregnated a child victim. RP 37. RCW 9.94A.535(3)(i) specifically authorizes a trial court to impose a sentence exceeding the standard range if the jury finds that "[t]he offense resulted in the pregnancy of a child victim of rape." The jury made this finding by special verdict. CP 135. Both the record and statute provided tenable reasons to support the trial court's exceptional sentence.

Thus, the only question on review is whether the length of Weaver's exceptional sentence "shocks the conscience of the reviewing court," such that no reasonable person would have imposed such a sentence. Ritchie, 126 Wn.2d at 396 (quoting Ross, 71 Wn. App. at 571). Given this Court's prior recognition of

the appalling facts giving rise to Weaver's conviction – his "violent[]" rape of a 13-year-old girl with a weapon, her resulting pregnancy and later abortion, and the DNA results from the fetal tissue confirming Weaver's culpability – the trial court's exceptional sentence of 250 months, or twice the high-end of the standard range, is neither shocking, nor unreasonable. Weaver, 140 Wn. App. at 351-52. Weaver's violent impregnation of a child victim who had to choose between giving birth to her rapist's child, or undergoing an abortion, provided substantial and compelling reasons to impose an exceptional sentence.

Weaver's claims that the trial court did not consider the purposes of the Sentencing Reform Act (SRA), or "mention the requirement that it find substantial and compelling reasons," to impose an exceptional sentence are directly refuted by the record. Appellant's Opening Br. at 6-7. The trial court's Conclusions of Law specifically provide:

> "[T]here are *substantial and compelling reasons to impose an exceptional sentence* based upon the jury's finding that, beyond a reasonable doubt, the defendant's offense 'resulted in the pregnancy of a child victim of rape.' . . . [T]he court finds that, based

> on the severity of the crimes committed by the defendant, an exceptional sentence pursuant to the aforementioned statutory aggravating factor is the *only way to ensure that the purposes of the SRA are effectuated.*"

CP 133 (emphasis added). The fact that the trial court "re-signed" the Findings of Fact and Conclusions of Law previously entered in 2005 is of no consequence because the trial court explicitly adopted the same reasoning after making an "independent determination." RP 37; CP 133. Weaver has not provided any statutory or case law authority suggesting that a trial court must redraft Findings of Fact and Conclusions of Law every time a defendant is resentenced, even when a later trial court has made the same findings and reached the same conclusions.

As this Court recognized over 20 years ago in Ross, and the state supreme court cited with approval in Ritchie, once a reviewing court has determined that the facts support an exceptional sentence above the standard range, and that those reasons are substantial and compelling, "there is often nothing more to say." Ritchie, 126 Wn.2d at 396 (quoting Ross, 71 Wn. App. at 572).

D. CONCLUSION

For the foregoing reasons, the Court should dismiss Weaver's appeal as moot, or alternatively, affirm his exceptional sentence.

DATED this 25th day of June, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Nancy Collins, the attorney for the appellant, at Nancy@washapp.org, containing a copy of the Brief of Respondent, in State v. Oliver William Weaver, Jr., Cause No. 72648-0, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 25 day of June, 2015.

Name:
Done in Seattle, Washington